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John Goldring

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BOOK REVIEW

WITHOUT THE LAW I

'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England. By Harry W. Arthurs. Toronto: University of Toronto Press, 1985.

*Reviewed by John Goldring.**

Dr. Harry Arthurs, President of York University in Toronto and formerly Dean of Osgoode Hall Law School, is probably best known outside Canada as the Chair of the Committee that produced a report entitled *Law and Learning*¹ in 1983. That report forced legal scholars throughout the common-law world to question and justify the nature of their enterprise. It called for a move away from the traditional black-letter concerns of academic lawyers to a broader, more intellectual, cross-disciplinary and theoretically informed undertaking that would examine the operation of the legal order, not just in technical terms, but in terms of its relation to society and wider intellectual concerns.

'Without the Law' will certainly be a defence to any charge that Arthurs does not practice what he preaches. It is a valuable attempt to explain the development of administrative law in England. It is less valuable as an account of the general nature of contemporary administrative law in that country and its former colonies and dominions. It is also an example of what might be called the 'Osgoode Hall Movement Against Judicial Review', which has set out to provide a critique of the role of judges and judicial review in public law cases on a variety of grounds. Although Arthurs himself, Terence Ison, and W.H. Angus (all members of this group) were criticising overemphasis on judicial review during the 1970s, this movement has been revived and strengthened by the enormous potential for judicial interference in public affairs provided

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* Professor of Law, Head of School, School of Law, MacQuarie University, New South Wales, Australia.

¹ Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Information Division of the Social Sciences and Humanities Research Council of Canada, April 1983).

by the *Canadian Charter of Rights and Freedoms*.² Though probably less extreme, scepticism about the political consequences of a system of judicial review has long been expressed in other federal states where judicial review of legislative action is the rule. The political role of judges has evoked criticism in the United States, as well as in the three major Commonwealth federations — Canada, India, and Australia — where judicial interpretation of the Constitution and its political consequences has led to calls for judicial restraint or judicial activism, depending on the time and on the perspective and ideology of the critic. The sceptics have not yet, however, produced a realistic or practical alternative.

In England, Canada, and Australia, a few lonely voices have drawn attention to the judicial role in other public law litigation. These critics have pointed out that legalism, which, as Arthurs stresses, is the dominant ideology of common-law judges, favours private interests, particularly property interests, at the expense of what Patrick McAuslan has called "interests of collective consumption." These interests are very much the concern of the modern state where corporatist, or reformist, forces take measures directed at the redistribution of resources within society, usually by legislation supported by administrative action. Lord Denning, whose judicial interventions exemplify an extreme of this kind, may have many admirers in the common-law world and some distinguished imitators,³ but most lawyers of a socialist or reformist turn of thought are not among them. Lord Denning's judgments in the public law are seen, as Young has pointed out, as frustrating legislative attempts to reform society. Although they may represent an extreme, they do demonstrate the contemporary importance of legalism in administrative law.

Arthurs seeks to provide an explanation of why legalist ideology and the growth of state administration have clashed and to make some suggestions as to how this conflict might be resolved. Consistent with the call made in *Law and Learning* for a new kind of legal scholarship that transcends the positivist, or legalist, paradigm of law, Arthurs has attempted to draw from the work of other scholarly disciplines, particularly history and sociology, to support his hypothesis. There can be no doubt that this work attempts to be interdisciplinary and theoretically informed.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. See T.G. Ison, "The Sovereignty of the Judiciary" (Address to the Australasian Universities Law School Association, 1985) [unpublished]; and A.C. Hutchinson, "The Rise and Ruse of Administrative Law Scholarship" (1985) 48 *Mod. L. Rev.* 243.

³ See Kirby P. in *Osmond v. Public Service Board of N.S.W.* (1984), [1984] 3 *N.S.W.L.R.* 447 (N.S.W. C.A.), rev'd (1986), 63 *A.L.R.* 559 (Aust. H.C.).

Arthurs himself says, "[T]his book is as much about law as about history."⁴ Some forty years ago, Julius Stone, who did more than any other individual in the common-law world outside the United States to emphasize the social context of law, pointed to the foolishness of lawyers attempting to become social scientists and for the need for legal scholars to draw judiciously on the materials provided by scholars in other disciplines.⁵ Arthurs admits that he is primarily a lawyer, but he skilfully uses material provided by other scholars. He eschews grand theory but makes use of paradigms, or theoretical constructs, to assist his explanation of the development of administrative justice in nineteenth-century England.

Arthurs notes that much legal history is problematic because it is written by lawyers who have been socialized into the legal profession.⁶ Thus, they share the legalist, or positivist, assumptions which became part of legal culture in the nineteenth century, especially the paradigm of legal centralism. To the extent that his own acculturation permits, Arthurs attempts to shed these assumptions and to suggest an explanation for the emergence of the modern Anglo-Commonwealth view of administrative law.

'Without the Law' is an attempt to explain rather than to describe. The subject of explanation is the development of the modern system of administrative law. Arthurs tells us that the thinking of society about any matters legal has been shaped and dominated by the views of lawyers. These views are themselves formed as a result of the professional socialization of practising lawyers and their ability to dictate what, within the dominant conception, or paradigm, of law, will or will not be regarded as 'law'. He draws on the works of historians, philosophers, and sociologists, and indeed the key to the ideological role of lawyers is encapsulated in a passage he quotes from the anthropologist Sally Falk Moore: "[I]t is the process of selection and securing compliance that ultimately dictates what will be 'the law' within the field."⁷ Arthurs sets out to establish that in the area of the ordering of the administrative process, as in other areas, the power of lawyers to define has shaped thinking about what is 'administrative law'. Arthurs sets out to show that there are other paradigms of law and that a 'pluralist' paradigm, which includes a view of law as a process of social ordering, can better

⁴ H.W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 121 [hereinafter, *'Without the Law'*].

⁵ J. Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control* (Sydney: Associated General Publications, 1946).

⁶ *'Without the Law'*, *supra*, note 4 at 14.

⁷ *Ibid.* at 178.

explain the emergence of a type of administrative order in nineteenth-century England. This approach has clear implications for the contemporary view of the legal ordering of administrative activity in countries that draw their formal law from England.

As befits a work which explicitly sets out to be theoretically informed, the first chapter discusses paradigms of law — that is, the way in which participants in discourse conceive or speak of 'law'. To describe paradigms of law is not to answer the question, "What is law?". Rather, it is to describe the field of social activities, or aspects of life, that may be denoted by the term 'law'. The traditional paradigm of law adopted by most lawyers is, of course, a positivist paradigm, which attributes the status of law only to formal rules and institutions based on them. The rules are ultimately commands issued by a legitimate authority which people obey; any other norms do not have the status of 'proper', or 'ordinary', law. Within this paradigm, the only legitimate authority is the state, and the instruments by which the state's commands are enforced are the legal profession and the courts. The operation of this paradigm requires an institutional hierarchy in which the courts are close to the summit. This paradigm, for Arthurs, is the 'legal centralism' paradigm. Within it, law is 'lawyer's law'. It is the paradigm adopted by Austin and Dicey and has previously been criticized most effectively by Arthurs.⁸

Social scientists have a different paradigm of law. For them, the institutional hierarchy is not a defining characteristic of law. The aspects of life, or fields of social activity, denoted by law are rules or practices by which people order their social activity. A formal enforcement mechanism is not necessary, though it may be present; for this paradigm, law is not at the centre of the universe, as it is for the legal centralist paradigm. This wider paradigm, which Arthurs characterizes as 'legal pluralism', includes the political, economic, and other dimensions of social ordering. Such a paradigm can accommodate quasi-autonomous orderings of social activity. Arthurs does not ignore the ideological aspects of law, which are at the same time part of, yet also separate from, the field of social activity and provide the climate of opinion that causes people to accept a system of values as legitimate.

It follows that an author who, like Arthurs, is a lawyer must be conscious of the ideological nature of the professional socialization of lawyers if he or she is to transcend the legal centralist paradigm of law. Arthurs makes a very good attempt to transcend his background.

⁸ H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall L.J.* 1.

Administrators, though not entirely immune from legal ideology, are socialized in a culture different from that of the lawyers, with some different basic values. McAuslan, whose contribution is acknowledged, has made a similar point.⁹ Arthurs's task is to examine the way administrative law has developed in the light of the influence of those different fields of social activity — the actors having ordered their activity in different ways.

The growth of the modern state has been marked by a centralization of power, which has made it a ready target, or victim, of legal centralism. Arthurs uses historical and sociological material¹⁰ to support his view that during the eighteenth and nineteenth centuries, English society changed in a way that called for new types of social ordering. Feudal English society was based on patronage and mutual obligations between those who had property and power (which were closely linked) and those who lacked them. The law was the means by which the feudal society was ordered and so was largely local and administered (often as custom) in local courts, though it reflected to a large extent the rules administered by the central courts in London.

As the basis of power changed from land to technology and capital, new semi-autonomous areas of social and commercial activity developed. Within these areas, new forms of social ordering grew. These new forms often had little to do with the formal rules administered in the central courts. Although these new forms operated quite successfully, changes in the nature of the state led to a process of centralization of state power. The dominance of a legal centralist paradigm within the growing state in the nineteenth century meant that the formal judicial machinery of the centralized state took over the activity of social ordering that previously existed in the semi-autonomous fields of social activity, which had developed their own ordering. Arthurs develops his thesis by using two historical studies, in both of which he seeks to show that the centralizing forces of legal centralism took over semi-autonomous fields of activity. Those areas are commercial and administrative law.

In England during the eighteenth and particularly the nineteenth centuries, when the modern state was emerging, the lawyers, and those for whose purposes the centralist paradigm of law was appropriate, found ready means within the law to consolidate central power. The judges of the central courts, who perceived themselves as the guardians of justice, used the common law judicial methodology developed by Sir Edward

⁹ P. McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46 Mod. L. Rev. 1.

¹⁰ Much of Arthurs' historical material is drawn from Harold Perkin's *Origins of Modern English Society 1780-1840* (Toronto: University of Toronto Press, 1969).

Coke and his successors to expand their jurisdictions into every area of social activity. The courts saw themselves as the repository of a justice that was uniform and, consistent with contemporary political thought, rational. This system of justice was thought to be applicable to all alike, regardless of livelihood or geography. It was one law for one nation; no member of the nation could claim to be exempt from it. Lord Mansfield was able to introduce the traditional practices and customs of European merchants into the common law. The merchants had developed to a high degree an ordering of their activities, including systems of rules and, in the form of arbitration, a relatively sophisticated dispute-resolution machinery, which did not rely at all on the courts or formal rules of law. Even so, merchants still showed reluctance to bring their disputes into court and preferred to settle them outside the formal systems, though still in a 'law-like' way. The courts responded by developing the common law in a way that, at least in theory, not only said that the customs of merchants were part of the law, but required commercial arbitrators to apply the rules of the common law which the judges had developed. As late as 1922, Scrutton L.J. said:

Arbitrators, unless expressly otherwise authorized, have to apply the laws of England. . . . [T]he Courts may require them . . . to state cases for the opinion of the court . . . in order that the Courts may insure the proper administration of the law by inferior tribunals. In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy.¹¹

More significant than judicial expansion of the common law was the growth of Parliamentary legislation. The influence of Bentham and his followers cannot be underestimated, both in the legal profession and in politics and public administration. Arthurs singles out the Benthamites, Brougham (among the lawyers), and Owen Chadwick (among the administrators) as instigators of this process. The political circumstances of the times meant that liberal, rational values were becoming dominant. The changing economic basis of social activity supported 'rationality'. Legislation, which until 1800 had been relatively rare, became a significant political instrument. The legislative reforms of the courts culminated in the replacement of the local courts by county courts in 1846 and the replacement of the ancient courts of common law and equity through the *Judicature Act* of 1875.¹² Arbitration acts made explicit the supervisory powers of the common-law courts over commercial arbitration. This part of Arthurs's thesis seems well supported. Many of the central notions

¹¹ *Czarnikow v. Roth, Schmidt & Co.* (1922), [1922] 2 K.B. 478 at 488.

¹² *Supreme Court of Judicature Acts, 1875* (U.K.), 38 & 39 Vict., c. 77.

come, with acknowledgement, from the work of Harold Perkin but are supported by Arthurs's own research. Arthurs then seeks to extend this type of reasoning to another set of Alsatis — the activities of state administration.

Administration, in the contemporary sense, is much newer than the activities of merchants. Here again Arthurs does not attempt to be his own historian. He draws on the work of Perkin and Henry Parris to isolate the aspects of governmental administration that are essential to the nature of the modern interventionist, or corporatist, state. The foundations were already well in place before the Northcote-Trevelyan reforms of the British Civil Service, but those reforms consolidated the position of a new and powerful element in British society — the professional, 'expert' civil service and its method of operation, which Arthurs describes as the 'New Administrative Technology': inspectorate, independent regulatory commissions, *et cetera*. This apparatus ordered itself and the lives of others through its ability to informally coerce, using such mechanisms as decisions to grant or withhold occupational licences. Quite correctly, Arthurs sees this law-like pattern falling within the pluralist paradigm of law. The example of the modern civil servant is Owen Chadwick rather than Sir Humphries Appleby of *Yes, Minister*.¹³ Chadwick was a dedicated activist in several areas, notably public health reform. He had counterparts in many other areas. Chadwick's concern was the achievement of reforms and the redistribution of social resources rather than the maintenance of his own power, though, of course, the achievement of reforms required the acquisition of power. Once the professional civil servants were able to acquire power, they too required a mechanism for ordering their activities. Those activities had to be reconciled with the growth of parliamentary democracy and the interests of other centres of power within society. Arthurs's argument is that government administration was also a quasi-autonomous field of social activity and that the machinery of the state system of law was initially as unsuited to regulating that activity as it had been, a century or so earlier, to regulating the activity of merchants. The activity of the expert administrators was another Alsatia.

Arthurs applies his legal pluralism paradigm here for two purposes. The first is to support the argument that it is a mistake to conceive, as the legal centralists do, that the law is confined to the formal rules governing such activity. Unless one is a dyed-in-the-wool legal positivist, it is easy to accept that the term 'administrative law' should cover the

¹³ J. Lynn and A. Jay, eds., *Yes Minister, The Diaries of a Cabinet Minister*, vol. 2 (London: British Broadcasting Corporation, 1982).

mechanisms that administrators use to order their social activities. The second argument is more difficult to accept. It is that the pluralist paradigm of law requires us to accept that the legal machinery of the state should acknowledge that it cannot, and should not, seek to govern all activities within this semi-autonomous sphere.

I am not convinced that the analogy which Arthurs draws between government administration and commercial arbitration is entirely appropriate. It is not made so by the fact that Lord Denning, the twentieth-century master of precedent-manipulation, relied on the commercial arbitration decision of *Hodgkinson v. Fernie*¹⁴ when, in *R. v. Northumberland Compensation Appeals Tribunal: Ex parte Shaw*,¹⁵ he convinced the Court of Appeal to review error of law on the face of the record as a ground for judicial review in administrative law cases. There are, of course, similarities; but commercial activity is subject to a number of practical restrictions, including economic factors, that do not apply equally to the activity of expert government administrators. I accept that administrative law should not be seen entirely from the perspective of what Harlow and Rawlings call 'red light' theory, that is, limitations on activity of the state. It can also be viewed as giving the 'green light' to, or as facilitating, collective, or redistributive, elements of state policy. However, I am not convinced that administrative law, any more than commercial law, can or should be seen as an area of social activity that should be vacated by the justice machinery of the state. Yet, such a vacation seems to be the underlying thrust of Arthurs's argument.¹⁶

The 'law' of the title of the book, without which administrators acted, is, of course, the lawyers' law of the legal centralist paradigm. Arthurs does provide compelling arguments that administrators in nineteenth-century England were able to order their activities but at the same time to act free of restraint by the formal justice machinery of the state because that machinery was slow to evolve appropriate control mechanisms. When it did, they were the sort of mechanisms which the legal centralist paradigm would lead us to expect, and they are rightly criticized by Arthurs on the ground of their clumsiness and inappropriate nature — and on the ground that, in practice, administrators were able to ignore them.

So far we have examined some of the key concepts employed by Arthurs. One concept used in the title but not analyzed in the text is 'administrative justice'. Is this an oxymoron, like 'military justice', as some libertarians would have us believe? I do not think so, but one

¹⁴ (1857) 3 C.B. (N.S.) 189.

¹⁵ (1951), [1952] 1 K.B. 338 at 351; [1952], 1 All E.R. 122.

¹⁶ See text at note 23.

must draw implications from the text to know why Arthurs uses the phrase in preference to administrative law. The failure to relate the ordering of the administrative process to some notion (or paradigm) of justice leaves the reader somewhat confused. However, Arthurs suggests that within the Alsatis some form of justice is dispensed, even though the results might not accord with the formal law and even though their justice was justice as perceived by the particular social group from which they were drawn.

Perhaps the least satisfactory part of the book is the last chapter, or postscript, entitled "Legal Pluralism and Administrative Law in Contemporary Perspective." Here Arthurs sets out an "Agenda for Analysis," but at times he seems to slip into prescription. His caution that legalist ideology and legal centralist tendencies are still strong is timely — but then, when he states that legal pluralism, like legal centralism, is a program as well as a paradigm, the reader is put on notice of the prescriptive nature of the agenda. Arthurs's own thinking shows that the sort of legal pluralism which is at the heart of his thesis is not a sound basis for prescription:

we cannot reconstitute law without reconstituting the State itself . . . perhaps we have learned that it will not be possible to move from paradigm to prescription, from reality to rule. In such a transition we necessarily leave behind much that is alive and organic, complex and problematic, specific and unstated — much that is genuinely "plural" in pluralism.¹⁷

Arthurs offers a 'pluralist' critique of administrative law. If we accept that administrative law, in the pluralist sense, is an instrument of state intervention, then it must be tested against its objectives — the effective achievement of government purposes and the protection of those adversely affected. Administrative law, in this pluralist perspective, is a legitimating device. One must be sceptical of Arthurs's apparent assumption that law transcends politics, for this is to ignore the work of the American realists brought to fruition recently by the Critical Legal Studies movement. Although law may not be solely an instrumental device for dominant interests to achieve their ends, it still retains some political aspects because of its ideological nature. Arthurs's discussion of this issue seems confused, for he also concedes that law and legal ideologies, not only embody, but shape or create the values of the societies in which they operate.¹⁸ This, certainly, is the lesson to be drawn from the analysis in the rest of his book.

¹⁷ *'Without the Law'*, *supra*, note 4 at 195.

¹⁸ *Ibid.* at 191-214.

However, one cannot quarrel with his assertion that, in the area of administrative law, "effectiveness has been the touchstone of legitimacy."¹⁹ This is the lesson Arthurs would have us learn from the historical analysis contained in the earlier part of the book. As late as the 1930s, when leading jurists such as Carleton Kemp Allen and Lord Hewart assumed Dicey's mantle and continued the attack on collectivism, they were attacking not so much the development of administrative law as the political trend of state interventionism. To the extent that administrative law has been relatively effective in enabling state intervention and in limiting the effect of that intervention on individuals, it has given both to the law and to the activities of the state a degree of legitimacy that they did not previously enjoy. This, Arthurs argues, is a consequence of the legal pluralism that has allowed the growth of a body of administrative law that does not conform to all of the legal centralist tenets. Here he draws on the work of E.P. Thompson, who suggested that law is effective as a legitimating device because it "transcends the particular context" but in so doing protects the values of the constituency.²⁰ Arthurs seems to accept that contemporary administrative law is consistent with both red-light and green-light theory. The former, typified by Dicey,²¹ establishes limits to the exercise of state power, while the latter provides a machinery through which the state can satisfy "interests of collective consumption,"²² including such measures as redistribution of wealth (through taxation and payment of welfare benefits), protection of consumers, and protection of the natural and man-made environment.

Yet Arthurs still seems to think that administrative law lacks the legitimacy of 'ordinary law'. To some extent, it is still an Alsatia, a separate realm where the tenets of ordinary law are not appropriate. Expense, delay, lack of access, procedural complexity, the disadvantage of adversary proceedings and strict rules of evidence, and the vicissitudes of judges in their legalistic method of decision making are all part and parcel of the judicial review of administrative action; those parts of ordinary law that are central in the legalist paradigm of law are certainly less appropriate in the area of state activity than they may be in the areas of property or contracts. Therefore, they limit the effectiveness of government activity and, consequently, the legitimacy of administrative law. If the adoption of a legal centralist paradigm of law with its legalist

¹⁹ *Ibid.* at 197.

²⁰ *Ibid.* at 199.

²¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., by E.C.S. Wade (London: MacMillan & Co., 1962).

²² McAuslan, *supra*, note 9.

ideology will not help the effectiveness of government, what will? Arthurs concludes:

We can hardly expect much from a system now largely designed and administered by a relatively homogeneous group of lawyers, whose expertise seldom extends beyond legal doctrine, whose ideology tends towards conservatism, and whose experience largely consists in dealing with isolated cases in an adversarial context.²³

He sees that, on his agenda, there are two kinds of jobs to be done. The first is a political job, which is best achieved by the appointment of resolute, committed, and technically competent administrators. The second is to ensure the effectiveness and integrity of the administration. The first job, he contends, is best achieved by open statements of policy to be judged by the political process. The second will involve some checks, not necessarily by judicial review, but more through sound institutional design of structures and procedures.

The two jobs are not as separate as Arthurs might suppose. If policy is to be open to political judgment (and no one would argue with this), does it follow that the administrators need to be 'committed'? Such a solution opens the way to problems of patronage — yet, the earlier chapters of the book show that the centralizing process, which characterized the emergence of the modern state, put an end to society based on patronage. No one seriously believes that any administrator is really politically neutral; but is not a degree of political non-partisanship (though not carried to absurd extremes) desirable, especially if one adopts, as Arthurs seems to do, the expertise model, which is so welcome to scholars of public administration? Perhaps commitment leads to the same type of limited vision among administrators that Arthurs rightly identifies as the effect of legalist ideology among lawyers; and, it must be asked, is the 'expert' solution always the best or preferable one?

One must accept that administrative structures and procedures should be designed well so that mechanisms of accountability and responsiveness are built in. However, is not the time well past in the modern state when we can destroy entirely what exists and replace it with new structures? In all probability the effort is not worth it. Perhaps a series of institutions and procedures imposed *ab extra* is not the ultimate solution, but it may be an improvement. The Australian 'New Administrative Law', designed by committees composed almost entirely of lawyers, who were therefore socialized almost exclusively in the legal ideology, may have incorporated some of the desirable characteristics that Arthurs seeks. As yet it is too early to tell. However, it is a measure that has been accepted in large degree by an eminent scholar and practitioner of public administration

²³ 'Without the Law', *supra*, note 4 at 201.

who is no friend of legal ideology as such,²⁴ though it is obviously not perfect.²⁵

In the closing pages of the book, Arthurs makes a telling criticism of the legal centralism that has characterized the recent development of administrative law in Canada. He assumes, as did the Franks Committee in England, that specialization is the key to effectiveness and that this should be recognized in institutional design. Administrative law should recognize a plurality of institutions, mechanisms, and *substantive* norms in the administrative process. Yet this institutional design must accommodate what both administrators and the general public expect. Such accommodation is necessary for legitimacy. Here, what Arthurs wants for the administration is also what is wanted in the 'ordinary law' — a high degree of certainty and predictability and some mechanism whereby individual decisions can be reviewed by a person or institution external to the primary decision-making process. Though it is not stated, this is probably the closest Arthurs comes to defining the characteristics of administrative justice — and it is the sort of definition that one might reasonably expect from a legalist as much as from an administrator whose highest priority is expertise and efficiency. This seems to be a substantive issue and not necessarily one which flows from the legal centralist form of discourse.

Arthurs accepts that the common law will not go away, though he seems to wish that it would. In Australia, the question is academic, for section 75(v) of the Commonwealth *Constitution* guarantees that in any matter in which a writ of prohibition, *mandamus*, *habeas corpus*, or an injunction is sought against the Commonwealth or an officer of the Commonwealth, the High Court of Australia shall have original jurisdiction.²⁶ In England, decisions such as *R. v. Northumberland Compensation Appeals Tribunal, Ex parte Shaw*²⁷ and *Anisminic Ltd v. Foreign Compensation Commission*²⁸ have extended the scope of judicial review by reviving the remedy of review for error of law (an instrument of legal centralism used in the other Alsatia described by Arthurs, commercial arbitration) and making the concept of 'jurisdictional error' virtually limitless. Arthurs refers to some similar Canadian decisions. Unless legalist

²⁴ *Review of the New South Wales Government Administration, Directions for Change, An Interim Report* (Sydney, 1977) (Commissioner: P. Wilenski).

²⁵ B. Jinks, "The New Administrative Law: Some Assumptions and Questions" (1982) 41 AJPA 209; R.C. Davey, "The New Administrative Law: A Comment of Cost" (1983) 42 AJPA 261.

²⁶ *Commonwealth of Australia Constitution Act* (U.K.), 63 & 64 Vict., c. 12.

²⁷ *Supra*, note 15.

²⁸ (1968), [1969] 2 A.C. 147; [1969] 1 All E.R. 208 (H.L.).

thinking ceases to be part of the intellectual equipment of lawyers, the trend must continue.

Arthurs thus recognizes that it is necessary to explore the relationship between ordinary law and administrative law and, possibly, to work out a means of accommodating the two. He says,

What is needed is a principle that recognizes both the constitutional necessity that all parts of the system comply with certain fundamental values, and the practical necessity that those values be expressed in quite different ways. Derived from such a principle would be a rule of comity ensuring mutual respect by each part of the others.²⁹

This seems to mean that the ordinary law must create a special place for 'administrative legality'. Here, Arthurs assimilates his version of the French model of administrative law, which appears to be based purely on the need for legitimacy and effectiveness, and the Australian Administrative Appeals Tribunal, which, though in many ways separate, is clearly the product of a legalist conception of administrative review. What appeals to Arthurs is that "[t]he premise of each of those arrangements or projects . . . is that to an extent administrative law must be understood and responded to in its own terms rather than subsumed within a general and undifferentiated notion of law."³⁰

This is probably correct, but the Australian experiment represents, consistent with other developments within common-law systems, a way in which the legal culture of the common law has been able to respond to the need for accommodation of a new form of social activity. It is much more an expansion of ordinary law than Arthurs would favour, and it is probably also more 'legal'. Yet the Administrative Appeals Tribunal is, to a degree, pluralistic. Because the majority of members of the Tribunal are appointed because of their expertise in some area other than the law, the Tribunal combines the professionalism, knowledge, and expertise within a particular area of state activity, upon which Arthurs sets great store, with the presence of 'legal' expertise (in the form of a legally qualified presiding officer) and review by the federal court on questions of law.

The Administrative Appeals Tribunal is not accountable in the political sense — its members are appointed, not elected. It does not, therefore, conform to the direct democracy model of review that has been proposed by Hutchinson, another Osgoode Hall critic of judicial review; but is this necessarily a bad thing? In Australia, Britain, and Canada, party politicians seem popularly to be regarded as necessary

²⁹ *'Without the Law'*, *supra*, note 4 at 210.

³⁰ *Ibid.* at 211.

but, even more, as evil. Democratic review, in the large, modern, corporatist state, would necessarily become partisan. Arthurs does not really consider the possibility. He favours review by *experts*, but who is to say who is an expert?

The Administrative Appeals Tribunal, though appointed and operating as much like a judicial tribunal as like a body of experts, received strong and well-reasoned admonitions from its then president, Mr. Justice Brennan, on the need to exercise restraint and to show respect for the policies of democratically elected governments.³¹ The tradition of judicial restraint, though often a myth in administrative law cases, is at least a valuable part of the legal culture which should enhance the legitimacy of the review procedure. Although the tribunal is not entirely a manifestation of legal centralism, it is very influenced by the legal culture; yet is so structured that its fundamentally legal (as opposed either to democratic or expertise) character will enable the common-law culture to accommodate the needs of the process of government administration and the requirements of the administrative culture. It would be wrong to assume that it is an *Alsatia*, or an autonomous structure separate from the ordinary law. Rather, it is an example of how the common law continues to accommodate, in a way that combines features of both centralist and pluralist paradigms, the demands of a new area of social activity.

The legal culture undoubtedly has its defects. The last few years have produced scholarship demonstrating beyond any reasonable doubt how judicial review has frustrated a number of desirable government initiatives. A Canadian or Australian aware of the influence of the legalist ideology on politics through judicial enforcement of a written Constitution (especially if, as in Canada, it embodies a *Charter of Rights*,³² which, as Arthurs points out, is the highest form of legal centralism) must be aware of the political impact of the conservative tendencies of legal ideology. Yet this ideology does, as most of its critics admit, allow for some fidelity to external sources, to a culture whose concern is basically for some form of justice. That form of justice may not be what all of us would hope to see as 'social justice' or even 'administrative justice'; but it may be a concept that is better fitted to ensuring the legitimacy of even highly reformist state action than would be the collective views of a small clique of administrative experts.

³¹ *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979), 2 A.L.D. 634; 24 A.L.R. 577.

³² *Canadian Charter of Rights and Freedoms*, *supra*, note 2.

The positive value of law and of legal culture is that it does provide checks and balances on the exercise of state power. Arthurs seems to accept that some checks are necessary in a liberal state if the power of the state is not to become absolute and therefore prone to corruption. Yet any system of checks on power will, necessarily, inhibit action which may, in the view of the experts, be the most effective means of reaching a given end. The test for the best system of checks is therefore likely to be a comparison with standards of what is most acceptable in terms of notions of justice — however that may be defined.

There are justified criticisms that common-law judges tend to use the leeways and loopholes of judicial reasoning under the influence of legalist ideology — and therefore of the conservative political values that have been absorbed into that ideology. Yet, as Thompson has suggested and Arthurs accepts, other more permanent values may also have been absorbed into that ideology. These include consistency, formal equality, natural justice, *et cetera*, all of which remain essential if the system in which the judges operate is to maintain any legitimacy. That legitimacy also depends on effectiveness, and this factor may assist in explaining why the common law, the ordinary law, has been able to accommodate the Alsatis which so concern Arthurs. The experts, the bureaucrats, do not always share this legal culture, or at least those parts of it that are concerned with justice. So there may be reasons for preferring judicial review to the sort of expertise-dominated administrative law that Arthurs appears to advocate.

If we are to have effective limits on state power, then the choices appear to be as follows: first, direct democratic controls, in theory certainly desirable but with some clear defects in practice; second, judicial review by the courts, with definite inherent cultural and political biases but a degree of commitment to justice; and third, the possibility of accommodating the views of experts and review of experts by experts under a system that is so structured to make wrong decisions discernable, reviewable, and correctable — but that also, in practice, would seem open to cultural bias. Who is to say that experts are any better fitted to make ultimate judgments about values than ordinary citizens? As the choice seems to be among these flawed alternatives, one is inclined to choose the least worst. The judges may be bad, but perhaps they present the least worst choice.

Arthurs is correct in setting this agenda and indicating the general trends that need to be explored if we are able to achieve an administrative law whose legal nature cannot be doubted. He is also correct in indicating some of the historical and sociological forces that have shaped the arena in which the process is to be worked out. That is the great value of

the book, and the confusing aspects of the final chapter do not detract from this effort. The debate will continue. Arthurs, at times, seems to ignore the extent to which the modern, interventionist state has shaped and will continue to shape the nature of our existence within society; but if we accept the contemporary state as a fact of life that needs constant adjustment and change, then Arthurs's analysis can provide assistance in understanding both the nature of the shaping process and the steps that we can take to influence it.

'Without the Law' is an unusual, stimulating, and important book. It exudes thoughtful scholarship and an unusual ability on the part of a scholar (who readily admits that he is primarily a lawyer) to draw on an exceptionally wide range of interdisciplinary material and thus to enhance our understanding of the law. No reader of the book could fail to develop new perceptions of administrative law, indeed of law in general. The historical analysis is stimulating. But, as with Karl Marx, Arthurs finds overwhelming the temptation to establish a prescriptive model on the basis of this analysis. Like Marx, Arthurs's prediction and prescription is the weakest part of the book, probably because it is just too difficult. The last chapter of the book is, frankly, a disappointment. The remainder of it, though at times relying too heavily on weak analogies, is itself an example of the sort of scholarship that Arthurs had advocated elsewhere. If others can meet the standards set by this example, legal scholarship will undoubtedly become much richer. Perhaps the best advice one can offer to aspiring legal scholars is to read this book and see if they can do better.